Office-Supreme Court, U.S.
FILED
APR 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY,
a corporation,

Respondent.

REPLY BRIEF.

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioner

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY,
a corporation,

Respondent.

REPLY BRIEF.

Respondent fails to meet the issue presented by this Petition. That issue is whether remedies created by the Federal Employer's Liability Act can be nullified by Rule 61 of the Federal Rules of Civil Procedure.

Stated differently, can a carrier, in the defense of a case where an employee has been injured through the violation of the Federal Safety Appliance Act, offer prejudicial evidence, have excluded proper evidence, and then successfully defend its conduct by the invocation of this procedural rule? Certainly, if Rule 61 can be so employed, then the substantive rights given by this Federal Statute can be vitally affected.

This is particularly true in a case such as this, where the only issue is the amount of damages. Petitioner had the right to a fair trial on that issue.

This Court has recognized that Rule 61 can, in effect, nullify the meaning of an Act of Congress. In *Bruno* v. *United States*, 308 U.S. 287, a conspiracy case, the Court refused to instruct the jury concerning the failure of a certain defendant to testify pursuant to a Federal Statute, 28 U. S. C. 632. The Court of Appeals held this was not reversible error (*Bruno* v. *United States* (CA 2), 105 F. 2d 921). In considering whether there had been reversible error, the Court considered 28 U. S. C. 391, which is, in substance, Rule 61, and noted, at P. 294:

> "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him."

Moreover, our thoughts, as well as those adopted by a number of Circuits, are best expressed in Judge Frank's dissenting opinion in *United States* v. *Liss* (CA 2), 137 F. 2d 992, wherein he said, at P. 1005:

"The Supreme Court recently admonished us that Congress when, in 28 U.S.C.A. §391, it provided that appellate courts shall give judgment 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties', did not intend that, where there have been 'substantial infringements of the right to a fair trial, we can ignore them. I must confess that I do not understand those persons—I do not include my colleagues among them—who, while purporting to worship the jury, applaud when the 'harmless error' doctrine is pushed to such an extreme as it is in the majority opinion here. My colleagues, in stating that there is a 'modern disposition to assume that an error has been harmless,' have failed to note what five circuit courts have observed: there has been a new trend in the Supreme Court concerning that doctrine since at least 1936; the rule is now said to be that, if error is shown, there must be reversal 'unless it affirmatively appears from the whole record that it was not prejudicial.'"

How the application of this rule can defeat the right of trial by jury which this court has sought to insure is also noted by Judge Frank when he said, pp. 1001, 1002:

"As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, *no matter by what unfair tactics it was persuaded to do so,* we judges, in actual fact, decide the case." (Emphasis added.)

That there is a disparity between the Circuits as to the application of this rule is demonstrated by the footnote.[3]

Indeed, there is a disparity between this decision of the Seventh Circuit and other decisions. We refer to *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.* (CA 7), 191 F. 2d 302, 310, wherein the Court held that the Court of Appeals would scan the trial more closely for error if it did not think the verdict was in accord with the weight of the evidence.

So also in *Worcester* v. *Pare Torpedo Co.* (CA 7), 127 F. 2d 945, that Court refused to be foreclosed by the rule but reversed on errors of evidence far less grievous than here.

Consider, too, the very recent decision of the Seventh Circuit in *Goldman* v. *Checker Taxi Co.* (CA 7), 325 F. 2d 853, 856, wherein that Circuit examined the errors and refused to adopt defendant's contention that the only issue was whether the trial court had properly exercised its discretion.

---

[3] *Naylor* v. *Isthmian S. S. Co.* (CA 2), 187 F. 2d 538, 541; *Beck* v. *Wings Field, Inc.* (CA 3), 122 F. 2d 114, 116; *Farris* v. *Interstate Circuit* (CA 5), 116 F. 2d 409, 412; *Rice* v. *Louisville & Nashville R. Co.* (CA 6), 309 F. 2d 930, 933; *University City, Mo.* v. *Home Fire & Marine Insurance Co.* (CA 8), 114 F. 2d 288, 295; *Fort Dodge Hotel Co.* v. *Bartelt* (CA 8), 119 F. 2d 253, 259; *Schillie* v. *Atchison, T. & S. F. R. Co.* (CA 8), 222 F. 2d 810, 815; *Lynch* v. *Oregon Lumber Co.* (CA 9), 108 F. 2d 283, 285, 286; *Sears* v. *Southern Pacific Co.* (CA 9), 313 F. 2d 498, 503; *Little* v. *United States* (CA 10), 73 F. 2d 861, 866, to mention a few.

In this case, however, the Court has failed to consider or mention many of the errors assigned, errors which went to the substantive rights of the litigants, in that they concerned the remedy.

Traylor's Testimony Not Rebuttal.

Now respondent justifies Traylor's testimony as rebuttal, stating, "The respondent was not limited in its rebuttal to merely showing that the alleged conversation with McWilliams did not take place." (P. 13)

After plaintiff had been cross examined by defendant concerning not having worked or been offered work by the railroad since his operation (App. I. 19a), he stated on redirect he had asked claim agent McWilliams if there was something else he could do, and was told the company did not do that any more (App. I. 22a). McWilliams then took the stand and denied any such conversation (T. 7-702). That, of course, constituted the rebuttal to the conversation.

Nor can this highly prejudicial evidence be justified as tending to prove that respondent refused to give petitioner the opportunity to work or that it would have been futile to take such work because he would have been an extra man not regularly employed (Opposition brief, P. 12).

The fallaciousness of this argument is pointed up by the fact that at no time did respondent offer any of the jobs in question to petitioner (App. I, 46a), and by the further fact that before a man would be put back on the job after an injury he goes to the company doctor, and his ability to pass that doctor's examination is determinative of his right to return (App. I, 47a and 50a).

Of course, it was undisputed that the railroad had never asked the plaintiff to take a physical examination nor had asked him to return to work.

As the case was presented, it is made to appear that petitioner had the exclusive determination of whether he would return to work. The part respondent played was obviated by a foreclosure of proof. After Traylor had testified as to the company rules and practices, we were prohibited from showing that it was the custom and practice of the railroad (App. I, 45a) concerning an injured employee to give him a back-to-work slip when it found that he was able to do so, and that unless he did return to work under these circumstances, to take him off the roster. Thus, the offer of proof was:

> "Mr. Dooley: Your Honor, I desire to show by this witness that it is the custom and practice of the railroad company, when it finds a man is fit to go back after an injury on the job, to give him a return-to-work slip; secondly, I likewise intend and offer to prove by this witness that it is the custom and practice to, if a man has been injured and who does not return to work, to take him off the roster. Now, I say that because the railroad company is contending in this case that this man should have returned to work. The railroad company has never given him a return-to-work slip." (App. I, 32a)

The custom and practice which petitioner sought to prove by this witness was stated so that its significance in the evidence was obvious to the District Judge. That is all that is required under the Federal Rules of Civil Procedure, 43(c). *U. S.* v. *Lowry* (CA 4), 246 F. 2d 472; and *Hoffman* v. *Palmer* (CA 2), 129 F. 2d 976.

Impartial Medical Examiners.

Respondent, conscious of the confusion resulting from the two court-appointed physicians testifying, one on behalf of the petitioner and the other on behalf of respondent, now urges: "* * * petitioner does not complain that the testimony of either impartial medical examiner was erroneous. He merely argues that the District Court did not properly administer the impartial medical program." (Opposition brief, P. 17)

In the District Court, the Court of Appeals, and here, our argument has been that after an examination under this rule, a second examination by another so-called impartial doctor should not be had so that at the trial of the case one party calls one doctor and the other party the other since such conduct cannot but mislead the jury.

This is not that situation where the Court enters an order pursuant to this rule directing that a party be examined by an orthopedist, neurosurgeon, psychiatrist, etc., on the same day or within a few days. Here we have one medical examination, a report filed adverse to respondent, and respondent then allowed to have a second examination by another impartial examiner in the same specialty.

There is no precedent for this bizarre procedure. Respondent has submitted none.

Respondent says the appointment and testimony of this second medical examiner was justified because a doctor who did not testify at the trial was of the opinion that there should be a removal of the patella and that Dr. Hall's report fails to mention this. This could hardly justify the appointment of a second doctor, let alone allowing that second doctor to testify in a case where there

was no contention made that the patella should be removed.

The proper procedure would have been to refer this man back to Dr. Hall for an answer to this question.

But, taking respondent's argument at its face value, how could a second doctor be called when the reasons for his appointment, namely, the opinion of a doctor who gave a deposition, were not alluded to at the trial?

There are other errors which the Court of Appeals refused to review under the guise of Rule 61. They all went to petitioner's damages—a substantive right.

This Court should award the writ to resolve the conflicts between the various Circuits and within this very Circuit as to the scope of Rule 61 of the Federal Rules of Civil Procedure. Otherwise, what is an error on a substantive right will be determined by the attitude of the particular three judges on the panel. What may be prejudicial error to one panel may not be to another. Certainly, this does not make for equal protection of the law and order in the administration of justice.

Respectfully submitted,

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,

Attorney for Petitioner.